

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202		DATE FILED: April 23, 2019 5:05 PM FILING ID: 9521820E32B80 CASE NUMBER: 2019CV31577
Plaintiff: DEFEND COLORADO, a Colorado nonprofit association v. Defendants: GOVERNOR JARED POLIS, and THE COLORADO AIR QUALITY CONTROL COMMISSION		↑ COURT USE ONLY ↑
Attorneys for Plaintiffs: Paul M. Seby, #27487 Matt Tieslau #47483 GREENBERG TRAUIG, LLP 1200 Seventeenth Street, Suite 2400 Denver, Colorado 80202 Phone Number: 303.572.6500 Fax Number: 303.572.6540 E-Mail: sebyp@gtlaw.com tieslaum@gtlaw.com		Case Number: Division: Courtroom:
<p align="center">COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND JUDICIAL REVIEW OF FINAL AGENCY ACTION</p>		

Plaintiff Defend Colorado, by and through its undersigned counsel, and pursuant to C.R.C.P. 57, C.R.C.P. 106(a)(4), C.R.S. § 25-7-120, C.R.S. § 24-4-106, and respectfully submits this Complaint for Declaratory and Injunctive Relief and Judicial Review of Final Agency Action against Defendants Colorado Governor Jared Polis and the Colorado Air Quality Control Commission, and states as follows:

INTRODUCTION

1. This action is an appeal from the Colorado Air Quality Control Commission's ("Commission's") refusal to consider Defend Colorado's Petition for Expedited Public Hearing and Request for Declaratory Relief ("Petition"), and a challenge to Governor Polis' involvement and interference in the Commission's consideration of the Petition and Governor Polis' separate interference in the Commission's duties under the Colorado's Air Pollution Prevention and Control Act ("Colorado Air Act"), C.R.S. § 25-7-101 *et. seq.*, and the federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*

2. This action seeks to compel the Commission to meet its obligations under the Colorado Air Act to hold a public hearing to develop the most accurate and complete inventory of air pollution sources that affect air quality in the State of Colorado possible, based on the best available science and data, and seeks a declaration that Governor Polis unlawfully interfered in the Commission's statutory obligations under the Colorado Air Act.

3. This hearing must be held, and the accurate and complete inventory of air pollution sources must be created, before the May 1, 2019 deadline by when Colorado must submit such data, and certify to the United States Environmental Protection Agency ("EPA"), whether Colorado has attained and complied with current national ambient air quality standards ("NAAQS") for ozone.

4. The consequences of an incomplete or inaccurate submission to EPA on May 1, 2019 are severe. If Colorado fails to certify to EPA that it has attained current NAAQS for ozone by May 1, 2019, EPA is required by the federal Clean Air Act to downgrade Colorado's current NAAQS "attainment" status, subjecting Coloradans to mandatory regulatory controls under the federal Clean Air Act that will affect all Coloradans, including stricter permitting requirements for new and existing businesses, stricter air emission control technologies for those businesses, stricter transportation requirements, and stricter monitoring requirements for air quality.

5. Such a downgrade would deprive Colorado of the flexibility to improve its air quality based on the unique conditions in Colorado and the priorities of Coloradans.

6. An accurate and complete inventory of emission sources that contribute to air pollution in Colorado must include an accounting of emissions from international sources, such as emissions from Asia transported to Colorado, and from "exceptional events," such as forest fires. It is well established and understood, including by the Commission, the Colorado Department of Public Health and Environment ("CDPHE"), and the Air Pollution Control Division ("Division"), that emissions from international sources and exceptional events contribute significantly to air pollution generally, and ozone concentrations in particular, in Colorado.

7. Both Colorado and EPA may determine that Colorado has attained the applicable ozone NAAQS if it can be demonstrated that, but for the contribution of emissions from international sources and exceptional events, Colorado's air quality would have attained the applicable ozone NAAQS.

8. Consistent with the Commission's statutory duties and the facts surrounding international emissions and exceptional events, on June 4, 2018, the Commission requested that EPA extend Colorado's deadline to comply with current NAAQS for ozone by one year. Exhibit 7A to Defend Colorado's Petition, Memorandum from Garrison Kaufman, Director, Air Pollution Control Division, to Doug Benevento, Regional Administrator, EPA Region VIII (June 4, 2018) ("Colorado Extension Request").

9. The Commission supported the Colorado Extension Request by noting that "emissions outside of the State's control, including naturally occurring emissions and emissions transported from other states and countries," were responsible for "the large majority of ozone concentrations in Colorado, a well-known 'reality' based in science and fact that Colorado, the Commission, and EPA have long been aware of. Exhibit 9 to Defend Colorado's Petition, at 3, Garrison Kaufman, Director, Air Pollution Control Division of CDPHE, Michael Silverstein, Executive Director of RAQC, Comments Re: Docket ID No. EPA-HQ-OAR-2018-0226 (Dec. 14, 2018) ("Joint Comments").

10. On November 14, 2018, EPA proposed to grant the Colorado Extension Request. Exhibit 8 to Defend Colorado's Petition, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 56781 (November, 14, 2018) ("Proposed Extension").

11. On February 14, 2019 Defend Colorado submitted its Petition to the Commission, requesting that the Commission comply with its statutory duty to develop an emissions inventory that accurately accounts for emissions from all pollution sources, hold a public hearing to collect and evaluate the best available science and data, and to include that complete and accurate inventory in Colorado's May 1, 2019 certification to EPA.

12. During the Commission's consideration of Defend Colorado's Petition, Governor Polis unilaterally and privately directed CDPHE, and the Division, to not to investigate or submit to EPA any demonstrations regarding the contribution of international emissions or exceptional events to Colorado's air quality and to oppose Defend Colorado's Petition.

13. On March 21, 2019, after a truncated meeting held largely in private executive session, the Commission decided that Defend Colorado's lacked standing to seek a declaratory order, and therefore declined to rule on Defend Colorado's Petition and issued a final order to that effect ("Commission Order on Petition").

14. The Commission's March 21, 2019 Final Order did not address Defend Colorado's petition for a public hearing to develop an accurate inventory of all pollution sources in Colorado.

15. Defend Colorado submitted an Emergency Motion for Reconsideration or Clarification of the Commission's Order on Defend Colorado's Petition ("Emergency Motion") on March 27, 2019 – requesting that the Commission address Defend Colorado's request for, and the Commission's statutory duty to, hold a public hearing to develop an accurate emissions inventory in advance of Colorado's May 1 certification to EPA.

16. On April 8, 2019, the Commission denied the Emergency Motion during a telephonic meeting held almost entirely in private executive session, and issued a Final Order on April 8, 2019 ("Commission Order on Emergency Motion").

17. Therefore, the Commission, CDPHE and the Division have all refused to comply with their statutory duty to compile a complete and accurate air pollution inventory, have affirmatively refused to consider known science and data on the contribution of emissions from international sources and exceptional events on Colorado's air quality, and the Commission denied the public an opportunity for a hearing on these issues as required under the Colorado Air Act.

18. Further, on March 26, 2019, Governor Polis unilaterally issued a letter to EPA withdrawing the Commission's June 4, 2018 Colorado Extension Request to EPA. Withdrawal of Colorado's Request to Extend the 2008 Ozone National Ambient Air Quality Standard Attainment Date for the Denver Metropolitan/North Front Range Nonattainment Area (March 26, 2019) ("Withdrawal Letter"), attached as Exhibit A, hereto.

19. Defend Colorado now asks that this Court declare that the Commission violated its statutory duties under the Colorado Air Act and the Clean Air Act by refusing to grant Defend Colorado's Petition, and order that Commission to hold a public hearing on the best available science and data to develop an accurate complete emissions inventory, including emissions from international sources and exceptional events, and require that the Commission include the results of that hearing in its direction to CDPHE and the Division for the submission of Colorado's May 1, 2019 certification to EPA.

20. Defend Colorado also asks this Court to declare that Governor Polis violated the Colorado Constitution and the Colorado Air Act by improperly influencing the Commission's decision to deny Defend Colorado's Petition, and by unilaterally and improperly withdrawing Colorado's extension request to EPA, and enjoin and invalidate Governor Polis' March 26, 2019 letter to EPA.

21. Further, given that the Commission may continue with its 2019 certification to EPA during the pendency of this lawsuit, Defend Colorado asks this Court to declare that any certification to EPA made by the Commission, absent the public hearing required by law, is

invalid for the reasons set forth in this Complaint, and require the Commission correct any invalid certification to EPA after holding a public hearing as required by law.

THE PARTIES

Defend Colorado:

22. Plaintiff Defend Colorado is a non-profit organization registered in the State of Colorado. One of Defend Colorado's primary purposes is to advocate for policies and regulations that align with the statutory mandates of the Colorado Air Act and the Clean Air Act.

- a. Defend Colorado's members include businesses and industry groups that are subject to air control regulations under the Colorado Air Act and the Clean Air Act.
- b. Defend Colorado's members include businesses and industry in Colorado who will be adversely impacted by the legal requirements that will be imposed on all Coloradans if the Commission fails to certify to EPA that it has attained current NAAQS by May 1, 2019, which will result in a downgrade Colorado's attainment status to "serious" nonattainment.
- c. Defend Colorado's members therefore have a clear interest in having the government of the state of Colorado, and the agencies authorized by that government, acting within the boundaries of the Colorado Constitution and Colorado Statutes, and a direct interest ensuring that public policy decision makers make informed and reasonable decisions based on sound science and the law when administering Colorado's obligations under the Colorado Air Act and Clean Air Act.

23. The harms that Defend Colorado and its members will experience from the Commission's failure to accurately account for all emissions sources during Colorado's May 1, 2019 certification to EPA, resulting in a "serious" nonattainment designation for the Denver Front Range Area, are several:

24. Under a "serious" nonattainment designation, Colorado will be subject to mandatory increased federal regulatory oversight and more stringent permitting and other compliance requirements that will impose immediate and direct burdens on Defend Colorado and its members, Colorado's citizens, businesses, and all "sources" of air emissions for decades to come.

25. These "sources" include commercial printing operations, industrial rubber and plastics productions, computer processing and data preparation, hospital facilities, food processors, and a large amount of oil and gas operators. *See Exhibit 14 to Defend Colorado's*

Petition, Jeremy Murray, Letter on Sources in the Denver-Metro Nonattainment Area with Allowable Emissions between 50-100tpy NOx and/or VOCs (Oct. 15, 2018),

26. Under the current “moderate” attainment status designation, only emissions sources of expected ozone precursor emissions over 100 tons per year (“tpy”) of emissions are classified as “major” sources that are subject to Clean Air Act permitting requirements known as Title V permitting. Sources under 100 tpy are classified as “minor” sources and subject to less burdensome State permitting requirements through Air Pollution Emission Notices. However, once under “serious” nonattainment status, the permitting trigger would decrease by 50%, with any emissions source of 50 tpy or greater subject to stricter Title V permitting requirements. 42 U.S.C. § 7511a(c).

27. The new 50 tpy threshold would newly subject a significant number of businesses, including Defend Colorado’s members, to the burdensome Title V permitting requirements. Recently, CDPHE identified over 600 sources in the Denver Front Range Area that would be subject to more severe Title V permitting requirements if the Denver Front Range Area is designated as a “serious” nonattainment area. *See* Exhibit 14 to Defend Colorado’s Petition, Jeremy Murray, Letter on Sources in the Denver-Metro Nonattainment Area with Allowable Emissions between 50-100tpy NOx and/or VOCs (Oct. 15, 2018). *Id.*

28. Additionally, “New” or “modified” (*i.e.*, expanding) “major sources,” which include Defend Colorado’s members, defined by the 50% lower threshold trigger that would result from a “serious” nonattainment classification for the Denver Front Range Area, will face stringent preconstruction permitting requirements. Such Colorado “sources” would have to offset any increase in their ozone precursor emissions at a ratio of 1.2 to 1.0. Such additional and more stringent permitting requirements will impose additional costs on Colorado businesses, discouraging the formation of new businesses, or the expansion of those already existing. This will send jobs out of the area, decrease opportunities for Coloradans who live in the area, and increase costs for Colorado’s consumers. *Id.* These additional regulatory burdens would not be limited to facilities captured by the new 50 tpy emissions trigger.

29. Colorado “sources,” including Defend Colorado’s members, already emitting over 100 tpy of ozone precursors also would be subject to more stringent regulatory requirements, such as a requirement to achieve lowest achievable emission rates when that source is modified. *Id.* These requirements are onerous and time consuming and drive up costs for industries operating in Colorado, hurting Colorado’s economy, businesses, and consumers. Further, as the State with only “serious” nonattainment area in the region, Colorado could very well see businesses migrate to nearby States with less stringent permitting requirements, further hurting Colorado’s economy, businesses, and citizens.

Governor Jared Polis:

30. Defendant Jared Polis is the current Governor of the State of Colorado and is the head of the executive branch, holding the supreme executive power of the state of Colorado. COLO. CONST. art. IV, § 2.

The Colorado Air Quality Control Commission:

31. Defendant Commission is an agency of the State of Colorado created pursuant to C.R.S. § 25-7-104. The Commission promulgates rules and regulations to implement the Colorado Air Act. The Commission is a “type one” agency empowered to adopt regulations establishing Colorado’s air quality programs. C.R.S. § 24-1-119(7)(a). As a “type one” agency, the Commission exercises its powers and duties, including rulemaking, independently of CDPHE. C.R.S. § Section 24-1-105(1); *see, e.g.*, C.R.S. §25-7-105 (duties of the Commission), 106 (additional Commission authority), 108 (Commission power to adopt ambient air quality standards), 109 (authority to promulgate emission control regulations).

JURISDICTION AND VENUE

32. Jurisdiction is proper pursuant to the judicial review provision of the Colorado Administrative Procedure Act (“APA”), which states that “any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective; . . . A proceeding for such review may be brought against the agency by its official title, individuals who comprise the agency, or any person representing the agency or acting on its behalf in the matter sought to be reviewed. C.R.S. § 24-4-106(4).

33. Jurisdiction is also proper pursuant to the judicial review provision of the Colorado Air Act, which states that “[a]ny final order or determination by the division or the commission shall be subject to judicial review in accordance with the provisions of the [Colorado Air Act] and the provisions of [the Colorado APA].” C.R.S. § 25-7-120(1).

34. Decisions rendered by government bodies or officers acting in a judicial or quasi-judicial role are reviewable by district courts under C.R.C.P. 106(a)(4). Relief against Governor Polis’ actions interfering with the Commission’s consideration of Defend Colorado’s Petition and issuing the Withdrawal Letter is appropriate under C.R.C.P. 106(a)(4) because Governor Polis abused his authority under Colorado law and there no other “plain, speedy, and adequate remedy otherwise provided by law.”

35. Additionally, Colorado courts have long “recognized that state officials can be sued in their official capacities to challenge the validity of constitutional provisions, statutes, and administrative policies,” which is also “especially true for the Governor who is defined by our Constitution as the supreme executive of the state.” *Ainscough v. Owens*, 90 P.3d 851, 853 (Colo. 2004). Defend Colorado therefore has a legally protected right and interest in “having a government that acts within the boundaries of our state constitution.” *Id.* at 856.

36. Declaratory judgment is an appropriate procedure by which to seek declaration of rights, status, and other legal relations under C.R.C.P. 57. Declaratory judgment under C.R.C.P. 57 is therefore appropriate to determine the rights, status, and other legal obligations of the Commission and Governor Polis under the Colorado Air Act and federal Clean Air Act.

37. The Commission's final order denying Defend Colorado's Petition was issued on March 21, 2019, and Defend Colorado has timely petitioned for judicial review of the Commission's final order pursuant to C.R.S. § 24-4-106(4), C.R.S. § 25-7-120(1), and C.R.C.P. 57.

38. Governor Polis' Withdrawal Letter was issued on March 26, 2019, and Defend Colorado has timely petitioned for review of Governor Polis' Withdrawal Letter under C.R.C.P. 106(a)(4) and C.R.C.P. 57.

39. Venue is proper in this Court pursuant to C.R.C.P. 98(b) because Defend Colorado's claims against Governor Polis and the Commission all arose in the City and County of Denver.

40. Venue is also proper as the Governor's "shall keep his office at the seat of government" (C.R.S. § 24-20-101), which seat "shall remain at the city and county of Denver" (COLO. CONST. art. VIII, § 2), and the CDPHE, the Division, and the Commission are all resident in the City and County of Denver pursuant to C.R.S. § 24-4-106(4).

GENERAL ALLEGATIONS

I. Applicable Statutory and Regulatory Authority.

A. National Ambient Air Quality Standards Under the Federal Clean Air Act

41. Under the Clean Air Act, EPA promulgates NAAQS for certain air pollutants, including ozone. 42 U.S.C. § 7410.

42. When EPA established a NAAQS for an air pollutant, Colorado then has a set amount of time to attain the standard, known as an attainment date. 42 USC § 7407(d); 42 U.S.C. § 7502.

43. Under the Clean Air Act, Colorado is also required to develop and implement air quality control programs designed to ensure that Colorado attains NAAQS by the attainment date. 42 U.S.C. § 7410.

44. Colorado is required to provide annual updates to EPA on Colorado's attainment progress through annual submissions to EPA certifying Colorado's current ambient air quality data (and the accuracy of that data) and the attainment status of Colorado's ambient air to current NAAQS by May 1st of each year. *Id.*; 40 CFR § 58.16.

45. Colorado's annual May 1 certification to EPA must contain a certification from the submitting state agency that the certification is "accurate to the best of [the State's] knowledge." 40 CFR § 58.15(a). Under the Colorado Air Act, that state agency is designated as the Commission. C.R.S. § 25-7-124(1).

46. Colorado's annual certification is not simply a regurgitation of the ambient air quality data for the last year – rather Colorado must certify both the raw ambient air quality data and apply that data to EPA's mandatory "design values" used to determine compliance with the relevant NAAQS. 40 CFR § 58.16(a).

47. A design value is calculated for each air quality monitor in an area, and the area's design value is the highest design value among the individual monitoring sites in the area. That highest design value is then used determine compliance with the relevant NAAQS. *Id.* The criteria for determining if an area is attaining the 2008 ozone NAAQS are set out in 40 CFR 50.15 and 40 CFR part 50, Appendix P.

48. Colorado's May 1 certification to EPA is therefore a certification of the accuracy of the Colorado's emission data and Colorado's legal position on whether it is in attainment or nonattainment for current NAAQS.

49. Once Colorado submits its May 1, 2019 certification to EPA, EPA is required to review that certification to determine whether to designate Colorado (or a portion of Colorado) as in attainment or nonattainment. 42 U.S.C. § 7501, *et. seq.*

50. If Colorado fails to certify that it achieved current NAAQS by the applicable attainment date as demonstrated by the State's May 1 certification, EPA is required by the Clean Air Act to certify Colorado (or a portion of Colorado) as in nonattainment. 42 U.S.C. § 7502.

51. Colorado has options under the Clean Air Act to avoid a nonattainment designation when events beyond Colorado's control influence Colorado's ambient air quality emissions concentrations:

- a. Section 172(a)(2)(C) of the Clean Air Act allows Colorado to request a one-year extension of their attainment date if the state meets certain requirements and has only a minimal number of NAAQS emissions data exceedances in the preceding year. 42 U.S.C. § 7502(a)(2)(C).
- b. Similarly, Section 181 of the Clean Air Act allows Colorado to request a one-year extension of its attainment date if the Colorado meets certain requirements and has had no more than 1 exceedance of the NAAQS for ozone in the preceding year. 42 U.S.C. § 7511(a)(5)
- c. Section 319(b) of the Clean Air Act requires that EPA allow Colorado to exclude emissions data influenced by exceptional events from their annual attainment certifications. 42 U.S.C. § 7619. Pursuant to Clean Air Act section 319(b), EPA promulgated the Exceptional Events Rule, which allows Colorado to exclude exceedances in ozone monitoring data if Colorado can show that the monitoring data was influenced by exceptional events. *See Treatment of Data Influenced by Exceptional Events*, 81 Fed. Reg. 68216 (Oct. 3, 2016). Section 319(b) demonstrations to EPA are known as

“exceptional events demonstrations.” *Id.* Exceptional events can include wildfires and the corresponding smoke plumes or high winds. *Id.*

- d. Finally, Section 179B of the Clean Air Act allows Colorado to avoid a nonattainment designation if Colorado demonstrates to the satisfaction of EPA that the state would have attained the NAAQS “but for” emissions emanating from outside of the United States. 42 U.S.C. § 7509a(b). Section 179B demonstrations to EPA are known as “international emissions demonstrations.”

52. Colorado also has the authority to “flag” data that qualifies for exceptional events or international emissions exclusions under Sections 319(b) and 179B of the Clean Air Act during their annual May 1 certifications. *See* EPA, Air Quality System Users Guide, Issue 2 (2018) (available at https://www.epa.gov/sites/production/files/2018-03/documents/aqs_user_guide_2018_2.pdf#%5B%7B%22num%22%3A270%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C69%2C720%2C0%5D).

53. Consistent with the Commission’s statutory duty under the Colorado Air Act to develop the most accurate emissions inventory possible, the Commission’s statutory duty under the Clean Air Act to provide accurate May 1 certifications to EPA, and the express direction under the Clean Air Act allowing Colorado to account for the effects of international emissions and exceptional events, the Commission has long studied and examined the effects of international emissions, and exceptional events, on air quality in Colorado. *See* Colorado Extension Request, *supra* ¶ 9; Joint Comments, *supra* ¶ 9.

54. The Commission is therefore well aware of the significant impact of international emissions and exceptional events on air quality in Colorado, and is aware of its duty to include a quantification of those impacts in any annual May 1 certification to EPA.

55. If Colorado fails to properly account for international emissions and exceptional events in its May 1, 2019 certification to EPA, and is designated as in nonattainment, it will be subject to increasingly stringent mandatory federal controls under the Clean Air Act, including stricter permitting requirements, emission controls, and monitoring requirements. 42 U.S.C. §§ 7501 – 7515.

56. For example, Colorado areas designated as in nonattainment are then required to revise their air quality control programs include more stringent requirements targeted at attaining NAAQS. The Clean Air Act then imposes additional conditions on Colorado's air quality control programs proportional to the severity of the nonattainment classification, such as increased monitoring requirements, mandatory emission reductions, more stringent limitations on new and existing sources of emissions, and additional attainment periods. 42 U.S.C. § 7501 *et. seq.* (nonattainment provisions in general); 42 U.S.C. § 7511 *et. seq.* (additional provisions for ozone nonattainment areas).

57. Colorado areas that are not in attainment are also required to come into attainment on a schedule set out by EPA pursuant to each NAAQS based on the date the individual NAAQS was promulgated and the severity of the nonattainment classification.

58. Colorado's failure to improve ambient air quality consistent with EPA's mandated attainment schedule will result in a mandatory downward area reclassification, and the imposition of more severe controls, even if actual air quality has improved. *See* Section 181 of the Clean Air Act, 42 U.S.C. § 7511; Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12264, at 12313 (Mar. 6, 2015).

B. The Colorado Air Pollution Prevention and Control Act

59. The Colorado legislature enacted the Colorado Air Act, C.R.S. § 25-7-101, *et seq.*

60. The Colorado Air Act established the Commission, a governmental agency “which shall consist of nine citizens of this state who shall be appointed by the governor with the consent of the senate.” C.R.S. §25-7-104.

61. Under the Colorado Air Act the Commission “shall serve as the state agency for all purposes of the [Clean Air Act] and regulations promulgated under said act.” C.R.S. §25-7-124(1).

62. This includes all correspondence and coordination efforts with EPA. *See id.* entitled “Relationship with federal government, regional agencies, and other states.”

63. The Commission is tasked with promulgating rules and regulations to implement the Colorado Air Act and Clean Air Act “as are consistent with the legislative declaration” of the Colorado Air Act. C.R.S. §25-7-105(1).

64. The Commission is also tasked with developing an effective air quality control program, including a comprehensive plan for attain current NAAQS, under the Colorado Air Act and Clean Air Act as is “consistent with the legislative declaration” of the Colorado Air Act. C.R.S. §25-7-106(1).

65. The legislative declaration set forth in the Colorado Air Act states:

“ . . . it is declared to be the policy of this state . . . to attain and maintain the national ambient air quality standards . . . To that end, it is the purpose of this article to . . . to require the development of an air quality control program in which the benefits of the air pollution control measures utilized *bear a reasonable relationship to the economic, environmental, and energy impacts and other costs of such measures* . . . The general assembly further recognizes that a *current and accurate inventory* of actual emissions of air pollutants *from all sources* is essential for the proper

identification and designation of attainment and nonattainment areas, the determination of the most cost-effective regulatory strategy to reduce pollution, the targeting of regulatory efforts to achieve the greatest health and environmental benefits, and the achievement of a federally approved clean air program. *In order to achieve the most accurate inventory of air pollution sources possible*, this article specifically provides incentives to achieve the *most accurate and complete inventory possible* and to provide for the most accurate enforcement program achievable based upon that inventory.”

C.R.S. § 25-7-102 (emphasis added).

66. Therefore, any rule, regulations, or air quality control program, policy, or strategy promulgated or pursued by the Commission under the Colorado Air Act or in furtherance of the Commission’s duties to uphold Colorado’s obligations under the Clean Air Act must be based on the “most accurate inventory of air pollution sources possible” and “bear a reasonable relationship to the economic, environmental, and energy impacts and costs of such measures.” *Id.*

67. Additionally, the Commission, “[u]pon petition by any person . . . may determine that the emission inventory of any criteria pollutant . . . for a region of the state is inadequate for purposes of commission rule-making or adjudications in connection with [Colorado’s air quality control program to attain NAAQS], selection of pollution control strategies, attribution of emissions to sources or categories of sources, or findings of adverse impacts. If . . . the commission finds that the emission inventory should be revised to take into consideration *existing credible studies or scientific data in order to reasonably attribute emissions to source categories*, it shall direct that such revision be performed . . .” C.R.S. §25-7-105(18).

68. The Commission is required to hold a public hearing “[p]rior to adopting, promulgating, amending, or modifying any ambient air quality standard authorized in section 25-7-108, or any emission control regulation authorized in section 25-7-109, or any other regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106.” C.R.S. §25-7-110(1).

69. The Commission is also required to hold a public hearing before ratifying any agreement between Colorado and the federal government under the Clean Air Act “involving, authorizing, or requiring compliance in this state with any ambient air quality standard or emission control regulation.” C.R.S. §25-7-124(3).

C. Colorado Statutes Governing Commission Rulemaking Procedures

70. The Colorado legislature also enacted the Colorado APA, Title 42, Article 4, of the Colorado Revised Statutes.

71. The Colorado APA also declares that “an agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with

others on mutually agreeable terms unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state. ... [A]gency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced economic efficiency, reduced consumer choice, increased producer and consumer costs, and restrictions on employment. ... [A]gency rules can negatively impact the state's business climate by impeding the ability of local businesses to compete with out-of-state businesses, by discouraging new or existing businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest." C.R.S. § 24-4-101.5 (entitled legislative declaration).

72. Under the Colorado APA, final agency action "shall be subject to juridical review" in Colorado district courts. C.R.S. § 24-4-106(2).

73. Under the Colorado APA, agency action shall be held unlawful if that action is "arbitrary or capricious," "contrary to constitutional right, power, privilege, or immunity," "an abuse or clearly unwarranted exercise of discretion," and "unsupported by substantial evidence when the record is considered as a whole." C.R.S. § 24-4-106(7)(b).

D. The Colorado Constitution

74. The Colorado Constitution divides the powers of the government of Colorado into three distinct branches, the legislative, executive, and judicial, and mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." COLO. CONST. art. III.

75. It is Governor Polis' responsibility to "take care that the laws be faithfully executed." COLO. CONST. art. IV, § 2.

76. The legislative power of the state is vested in the general assembly. COLO. CONST. art. V, §1.

77. The Commission is an independent agency and is solely a creature of statute, having "only those powers expressly conferred by the legislature." *Pawnee Well Users, Inc. v. Wolfe*, 320 P.3d 320, 326 (Colo. 2013) (citing *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo. 2003)).

78. Governor Polis cannot therefore usurp the legislative power explicitly delegated to the Commission in violation of the separation of powers required by the Colorado Constitution.

II. Defend Colorado's Petition.

A. The 2008 Ozone National Ambient Air Quality Standards

79. On March 27, 2008 EPA finalized NAAQS for ozone of 75 parts per billion ("2008 ozone NAAQS"). 73 Fed. Reg. 16436.

80. Nonattainment areas for ozone are classified as either marginal, moderate, serious, severe, or extreme. 42 U.S.C. § 7511(a)(1).

81. Colorado failed to attain the 2008 ozone NAAQS in the Denver Metro/North Front Range Area ("Denver Front Range Area") by the initial attainment date, and the Denver Front Range Area was classified as in "marginal" nonattainment by EPA on July 20, 2012. 2008 Ozone NAAQS Designations, 77 Fed. Reg. 30,088 (May 21, 2012).

82. The Denver Front Range Area again failed to attain the 2008 ozone NAAQS and was classified as in "moderate" nonattainment by EPA in early 2016. Reclassification of Several Areas for the 2008 Ozone NAAQS, 81 Fed. Reg. 26,697, 26,699 (May 4, 2016).

83. The Denver Front Range Area's new attainment date under its "moderate" nonattainment designation was July 20, 2018. *Id.*

84. On April 26, 2018, Colorado certified its 2017 emissions monitoring data to EPA via letter. Monica S. Morales, Annual Certification Letter to EPA (April 26, 2018).

85. Colorado's 2018 certification to EPA indicated that the Denver Front Range Area failed to attain the current 2008 ozone NAAQS in 2017.

86. EPA was therefore bound by Colorado's 2018 certification letter to classify the Denver Front Range Area as in "serious" nonattainment of the 2008 ozone NAAQS.

87. However, on June 4, 2018, Colorado, via the Division, CDPHE, and Commission, sent a letter request to EPA requesting a one year extension of the 2008 NAAQS ozone attainment deadline for the Denver Front Range Area until June 20, 2019. *See* "Colorado Extension Request, *supra* ¶ 9.

88. Colorado's attainment date extension request for the Denver Front Range Area was based both on a minimal number of exceedances in the prior data year under Sections 172(a)(2)(C) and 181 of the Clean Air Act, and exceptional events exclusions under Section 319(b) and EPA's exceptional events rule.

89. On November 14, 2018, EPA published a proposed rule to grant Colorado's one year extension of the 2008 NAAQS ozone attainment deadline until June 20, 2019. *See* Exhibit 8 to Defend Colorado's Petition, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as

Moderate for the 2008 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 56781 (November, 14, 2018).

90. If EPA finalizes its proposal to grant Colorado's June 4, 2018 request, the Denver Front Range Area's new attainment date will be June 20, 2019.

91. EPA will then make an attainment designation decision for the Denver Front Range Area based on Colorado's May 1, 2019 annual certification to EPA.

92. If Colorado certifies to EPA that the Denver Front Range Area failed to attain current NAAQS by Colorado's May 1, 2019 annual certification, EPA will be required downgrade Colorado's attainment status to "serious" nonattainment. 42 U.S.C. § 7511(b)(2).

93. Therefore, Colorado's May 1, 2019 certification to EPA is a critical submission, because it binds EPA to act accordingly without room for variation.

B. The Commission's Explicit Knowledge of the Significant Effects of International Emissions and Exceptional Events on Ozone Concentrations in Colorado

94. The Commission has long been aware that international emissions and exceptional events effect ozone concentrations in Colorado, both from information published by EPA and by the State of Colorado's own research efforts.

95. The Director of the Division, William C. Allison, submitted comments on EPA's proposed 2015 NAAQS Revisions, urging EPA to reconsider the ozone standards for States so as to account for "international transport, primarily from Asia" as a primary factor for Colorado's elevated ozone levels. *See* Exhibit 3 to Defend Colorado's Petition, State of Colorado Comments, Docket ID EPA-HQ-OAR-2008-0699; FRL-9918-43-OAR (Mar. 17, 2015).

96. Those comments observed that background ozone levels in Colorado are often close to, or above, the ozone NAAQS, rendering Colorado at a severe disadvantage for attaining ozone NAAQS. *Id.* at 4.

97. Colorado expressly supported the technical evidence and conclusion set forth in the Integrated Science Assessment, prepared by the National Center for Environmental Assessment – Office of Research and Development concurrently with EPA's 2015 NAAQS Revisions, that the high background ozone levels were not attributable to Colorado-specific anthropogenic sources – citing to ozone measurements of between 65 and 74 ppb at the remote air quality monitoring sites in Colorado with few, if any, anthropogenic contributions. *Id.*; Integrated Science Assessment for Ozone and Related Photochemical Oxidants (Fed. Reg. Doc No. 2013-03471) (Final Report, Feb. 15, 2013), available at <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492>.

98. Colorado argued that “there is a real and significant impact on Colorado’s [ozone] levels from international transport of emissions . . . which Colorado has no ability to impose controls on.” *Id.*

99. Colorado requested that EPA allow States to account for the intervening effects of international emissions and exceptional events when reporting ozone levels under annual Clean Air Act submittals. *Id.* at 5.

100. On June 4, 2018, Colorado requested that EPA grant an extension of Colorado’s attainment deadline under the 2008 ozone NAAQS, in part based on the effects of exceptional events causing increased ozone concentrations in Colorado. *See* Colorado Extension Request, *supra* ¶ 9.

101. EPA Proposed to grant Colorado’s requested attainment date extension in November of 2018. *See* Proposed Extension, *supra* ¶ 10.

102. On December 14, 2018, CDPHE and the Regional Air Quality Council (“RAQC”) jointly commented in support of EPA’s proposed extension for Colorado’s ozone attainment date. *See* Joint Comments, *supra* ¶ 9.

103. Specifically, CDPHE and the RAQC noted:

Colorado has seen a dramatic decline of ambient levels of oil and gas related VOCs . . . show[ing a] downward trend in [Denver Front Range Area] ozone design values . . . Despite its success in dramatically reducing VOC and NOx emissions, Colorado continues to face challenges in meeting both the 2008 and 2015 NAAQS. This is due in large part to the fact that the large majority of ozone concentrations in the [Denver Front Range Area] are the result of emissions outside of the State’s control, including naturally occurring emissions and emissions transported from other states and countries. Given this reality, and the fact that Colorado has already significantly reduced ozone precursor emissions within the [Denver Front Range Area] and across the State, achieving additional reductions in ambient ozone levels will require time and hard work to develop and implement meaningful emission reduction strategies.

104. Colorado established the RAQC as the lead air quality planning agency in 1989. The RAQC develops and proposes effective and cost-efficient air quality planning initiatives with input from local government agencies, the private sector, stakeholder groups, and citizens. (<https://raqc.org/about/>).

105. The RAQC and its staff work closely with the Division and Commission in assessing and developing air quality plans and programs. *Id.*

106. Recently, the RAQC, at the direction of the Commission and the Division, researched the effects of international emissions and exceptional events on ozone

concentrations in Colorado in order to evaluate the possibility of Colorado making demonstrations to EPA.

107. As a part of the RAQC's research, the RAQC contracted with Ramboll Environ to perform a modeling analysis of the effects of international emissions on ozone concentrations in Colorado. Ramboll Environ presented a summary of its modeling efforts to the RAQC on November 2, 2017, during the RAQC's 2017 Ozone Modeling Forum. Ramboll Environ's modeling confirmed that international emissions are contributing significantly to ozone concentrations in Colorado and are a "but for" cause of Colorado's current failure to attain the 2008 ozone NAAQS. *See* Exhibit 1 to Defend Colorado's Petition, Morris and McNally, "Ozone Contributions of International Emissions Using 2011 Modeling Platform" (Nov. 2, 2017).

108. The Commission's, CDPHE's, Division's, and RAQC's investigation of international emissions and exceptional events in Colorado were part of a comprehensive effort by Colorado, as backed by then Governor Hickenlooper whose administration stated that Colorado would use "a combination of rules and non-regulatory measures to cut ozone" while also allowing Colorado to exclude out-of-state foreign pollution from consideration of the Denver Front Range Area's attainment designation. *See* Tom Ramstack, Denver's ozone pollution prompts environmental policy concerns (May 2, 2018) (available at https://www.coloradopolitics.com/news/denver-s-ozone-pollution-prompts-environmental-policy-concerns/article_e8aac667-b335-5be7-995a-073d34f16df5.html); Bruce Finley, Polis blocks blame-it-on-China push to prevent EPA from flunking Colorado as "serious" violator of federal air-quality standards (March 22, 2019) (available at <https://www.denverpost.com/2019/03/22/colorado-air-quality-violations/>).

109. Despite the Commission's longstanding knowledge of the effects of international emissions and exceptional events on ozone concentrations in Colorado, prior direction to the RAQC to investigate international emissions and exceptional events, and Colorado's June 4, 2018 attainment date extension request which acknowledged the effects of exceptional events on ozone concentrations in Colorado, the Commission has not taken the necessary steps to prepare an accurate and complete inventory of air emission sources that takes into account emissions from international emissions or exceptional events in advance of Colorado's May 1, 2019 certification to EPA.

C. Defend Colorado's Petition

110. Defend Colorado closely followed Colorado's attainment date extension request submitted on June 4, 2018, and commented in support of EPA's proposed grant of Colorado's attainment date extension request. *See* Exhibit 10 to Defend Colorado's Petition, Defend Colorado's Comments in support of Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards (Docket ID No. EPA-HQOAR-2018-0226; FRL-9986-44-0AR) (Dec. 14, 2018).

111. Preliminary emissions data reported to the Commission by the Division in late 2018 indicated that Colorado may have failed to attain the 2008 ozone NAAQS in 2018. *See* Gordon Pierce, 2018 Summer Ozone Season Review – Briefing to the Colorado Air Quality Control Commission (Oct. 18, 2018).

112. At the same time, the RAQC’s Stationary/Area Sources Committee indicated that data showed that Colorado had likely attained the 2008 ozone NAAQS but for the contribution of emissions from international sources and exceptional events. *See* Amanda Brimmer, RAQC Committee Overview, Stationary/Area Sources Committee, January 25, 2019 (available at https://raqc.egnyte.com/dl/MmDhP9OQb0/2019-01-25_CommitteeOverview_ab1.pdf)

113. However, when Governor Polis took office in January of 2019 he ignored the data and science being considered by the RAQC, and instead directed CDPHE and the Division to forego any efforts to take into account emissions from international sources or exceptional events when preparing and submitting Colorado’s May 1, 2019 certification to EPA, a direction that was in direct contradiction to the science and facts known to the Commission, CDPHE, the Division, the RAQC, and Governor Polis.

114. On February 14, 2019 Defend Colorado submitted its Petition to the Commission. Defend Colorado’s Petition made two primary requests for relief:

- a. First, Defend Colorado petitioned that the Commission comply with its statutory duties under the Colorado Air Act and federal Clean Air Act to develop the most accurate and complete emissions inventory possible for inclusion in the Commission’s May 1 certification to EPA by holding an expedited public hearing, in advance of Colorado’s May 1 certification deadline, to examine and quantify the effects of international emissions and exceptional events on ozone concentrations in Colorado during the current time period relevant to Colorado’s pending (and proposed by EPA) June 20, 2019 compliance period.
- b. Second, Defend Colorado requested that, if the results of the expedited public hearing supported a Clean Air Act Section 179B international emissions and Section 319(b) exceptional events demonstration, the Commission issue a declaratory order directing CDPHE and the Division to include an international emissions and exceptional events demonstration with Colorado’s May 1 certification to EPA.

115. The Commission acknowledged receipt of Defend Colorado’s Petition at its February 21, 2019 regular monthly meeting, and voted unanimously to consider the Petition at its March 21, 2019 regular monthly meeting.

116. The Division responded to Defend Colorado’s Petition on March 8, 2019. The Division specifically noted in its response that “Governor Polis has considered [the issue of a

179B international emissions demonstration], and has determined that the best policy for Colorado is to move forward with planning efforts under the 2008 ozone NAAQS” for a “serious” nonattainment designation. The Air Pollution Control Division’s Response to Defend Colorado’s Petition for Expedited Public Hearing and Request for Declaratory Order (“Division Response”), at 1. To that end, the Division noted that “Governor Polis has specifically directed the Division not to further investigate or to submit a 179B(b) demonstration. Instead, the Division will turn its resources towards the development and implementation of revisions to [Colorado’s air quality planning program] to satisfy the requirements for a Serious ozone nonattainment area.” *Id.* at 6.

117. The Division also asserted that it is the Division’s, and not the Commission’s role to “provide EPA with accurate air quality monitoring data.” *Id.* at 4.

118. Defend Colorado replied to the Division’s response on March 15, 2019.

119. On March 21, 2019 the Commission considered Defend Colorado’s Petition and unanimously voted to decline to rule on the Petition, with virtually all of its deliberations occurring in private executive session outside of the public hearing.

120. The Commission issued an Order on March 22, 2019, dated as March 21, 2019, which denied Defend Colorado’s Petition stating that because “Defend Colorado does not have standing to petition for a declaratory order, the Commission declines to rule on the petition.” Commission Order, at 2 (March 21, 2019).

121. The Commission’s Order entirely ignored Defend Colorado’s distinct and separate request for an expedited public hearing on the issue of compiling an accurate and comprehensive inventory, based on the best science and data, of the sources of air emissions contributing to ambient air quality in Colorado.

122. Commissioner Elise Jones was quoted by the Denver Post after the March 21, 2019 Commission meeting as stating “[y]ou can pursue procedural pathways to get off the hook. But Coloradans would still be breathing unhealthy air.” Bruce Finley, Polis blocks blame-it-on-China push to prevent EPA from flunking Colorado as “serious” violator of federal air-quality standards (March 22, 2019) (available at <https://www.denverpost.com/2019/03/22/colorado-air-quality-violations/>).

123. The Commission’s Order, and Commissioner Elise Jones comment, ignore the mandate of the Colorado Air Act that the Commission hold a hearing when taking actions affecting, amending, or modifying Colorado’s attainment status, to develop an accurate air emissions inventory using the best science and data, and to base Colorado’s air quality control programs and policies on that inventory. Instead, the Commission unlawfully and explicitly decided that Colorado’s air quality control program should be based on what it knows to be incomplete and inaccurate data that ignores the best available science.

124. Due to the legal errors in the Commission's March 21, 2019 Order and the failure of the Commission to consider Defend Colorado's separate request for an expedited public hearing, Defend Colorado submitted an Emergency Motion for Reconsideration or Clarification of the Commission's Order on Defend Colorado's Petition ("Emergency Motion") on March 27, 2019.

125. Defend Colorado's Emergency Motion requested that the Commission reconsider its March 21, 2019 Order, address Defend Colorado's separate and distinct petition for an expedited public hearing to examine the effects of international emissions and exceptional events on ozone concentrations in Colorado, or in the alternative, to provide clarification that the Commission's March 21, 2019 order was separately denying Defend Colorado's petition for that expedited public hearing.

126. On April 5, 2019 the Commission held a telephonic meeting to consider Defend Colorado's Emergency Meeting, during which no member of the public, including Defend Colorado, was allowed to make any presentations, and which was held almost entirely private executive session, where the original six Commissioners that decided the initial Petition unanimously voted to deny the Emergency Motion.

127. On April 8, 2019, the Commission circulated a Commission Order denying Defend Colorado's Emergency Motion. The Commission's Order characterized the ultimate relief sought by Defend Colorado as for a declaratory order, that the Commission did not believe Defend Colorado has standing to seek a declaratory order, and that "there are no additional grounds for a hearing." Commission Order, at 2 (April 8, 2019).

D. Governor Polis' Interference in the Commission's Consideration of Defend Colorado's Petition and Separate Withdrawal Letter

128. Governor Polis directed the CDPHE and the Division to forego any efforts related to Section 179B international emissions or a Section 319(b) exceptional events demonstration after taking office in January of 2019. Division Response, at 6; Compl., *supra*, at ¶ C.113, C.116.

129. The Division asserted that Governor Polis "has considered [the issue of a 179B international emissions demonstration], and has determined that the best policy for Colorado is to move forward with planning efforts under the 2008 ozone NAAQS" for a "serious" nonattainment designation. Division Response, at 1.

130. Governor Polis also "specifically directed the Division not to further investigate or to submit a 179B(b) demonstration." *Id.* at 6.

131. In public statements after the Commission denied Defend Colorado's Petition, Governor Polis stated that "[t]here's too much smog in our air, and instead of hiding behind bureaucracy and paperwork that delay action, we are moving forward to make our air cleaner now," noting that he did not believe that Colorado should "use pollution from China as an

excuse not to improve our air quality here in Colorado.” See Kieran Nicholson, Polis withdraws request to EPA for more time to bring Colorado into compliance with federal air-quality standards (March 29, 2019) (available at <https://www.denverpost.com/2019/03/29/colorado-air-quality-standards-extension-withdrawn/>). In so doing, Governor Polis was declaring that the Commission’s statutory duty to develop and submit to EPA a complete and accurate air emissions inventory based on the best science and data, and its duty to base Colorado’s air quality programs on that complete and accurate inventory, was “bureaucracy” and “paperwork.”

132. Governor Polis also noted that “[w]e must act with a sense of urgency to reduce smog. That means we can’t sit back and rely on a waiver or other countries to get us there. We have to do everything in our power right here at home.” Bruce Finley, Polis blocks blame-it-on-China push to prevent EPA from flunking Colorado as “serious” violator of federal air-quality standards (March 22, 2019) (available at <https://www.denverpost.com/2019/03/22/colorado-air-quality-violations/>)

133. On March 26, 2019, Governor Polis unilaterally issued a letter to EPA expressly claiming to withdraw Colorado’s June 4, 2018 attainment date extension request to EPA, which EPA has already proposed to grant. Exhibit A, Withdrawal Letter, *supra* ¶ 18.

134. Governor Polis’ Withdrawal Letter asserted “that the interests of our citizens are best served by moving aggressively forward and without delay in our efforts to reduce ground level ozone concentrations in the [Denver North Front Range Area],” and requested that “EPA continue to work closely with our air planning agencies to develop appropriate and achievable schedules and strategies for continuing progress towards attainment of the 2008 NAAQS.” *Id.* at 1. Governor Polis thus conceded that he believed that both Colorado and EPA policy and regulations should not be based on the best available and most complete science and data that the Commission is obligated by statute to collect and which must be the foundation of Colorado’s air quality control program.

135. Governor Polis’ Withdrawal Letter was not signed by any official from the Commission, CDPHE, or the Division.

136. Governor Polis’ Withdrawal Letter was not the result of any public hearing in front of the Commission, CDPHE, or the Division.

137. Governor Polis’ Withdrawal Letter represents a unilateral exercise of authority by the Governor, as head of the executive branch, over a process specifically delineated by the Colorado legislature in the Colorado Air Act.

138. If Governor Polis’ Withdrawal Letter is accepted by EPA, it will have the retroactive effect of making Colorado’s prior 2018 certification to EPA as the final certification relevant to Colorado’s attainment date for the 2008 ozone NAAQS.

139. Colorado’s April 26, 2018 certification to EPA showed that Colorado failed to attain the 2008 ozone NAAQS in the Denver Front Range Area, absent the additional context

of the intervening effects of international emissions and exceptional events on ozone concentrations.

140. Therefore, Colorado's April 26, 2018 certification to EPA, absent the context provided Colorado's separate June 4, 2018 attainment date extension request which requested that exceptional events be excluded from Colorado's prior attainment year emissions data, would require that EPA designate the Denver Front Range Area as in "serious" nonattainment for the 2008 ozone NAAQS.

FIRST CLAIM FOR RELIEF

(Colorado Air Act – Commission Only)

(Violation of the Statutory Requirement in the Colorado Air Act to Hold a Hearing Before Taking Actions Involving or Modifying Colorado's Air Quality Control Program and Colorado's Obligations Under the Clean Air Act and the Colorado Air Act)

141. Defend Colorado hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

142. Under the Colorado Air Act, "[p]rior to adopting, promulgating, amending, or modifying any ambient air quality standard authorized in section 25-7-108, or any emission control regulation authorized in section 25-7-109, or any other regulatory plans or programs authorized by sections 25-7-105(1)(c) or 25-7-106, the [C]ommission *shall conduct a public hearing.*" C.R.S. § 25-7-110(1).

143. Additionally, any "agreement involving, authorizing, or requiring compliance in this state with any ambient air quality standard or emission control regulation shall not be effective unless or until the commission has held a hearing with respect to such standard or regulation and has adopted the same in compliance with section 25-7-110." C.R.S. § 25-7-124(3).

144. Finally, upon "petition by any person or on its own motion, for good cause shown, the [C]ommission may determine that the emission inventory of any criteria pollutant, including a surrogate or precursor for that pollutant, for a region of the state is inadequate for purposes of commission rule-making or adjudications in connection with development of [state air quality control programs], selection of pollution control strategies, attribution of emissions to sources or categories of sources, or findings of adverse impacts." C.R.S. § 25-7-105(18).

145. Colorado's current proposed attainment deadline for the 2008 ozone NAAQS is June 20, 2019. Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 56781 (November, 14, 2018).

146. Colorado's May 1, 2019 certification to EPA will certify Colorado's, and the Commission's legal position on whether Colorado is in attainment or nonattainment for 2008 ozone NAAQS.

147. EPA will therefore be required by Colorado's May 1, 2019 certification to designate the Denver Front Range Area as in "serious" nonattainment. 42 U.S.C. § 7502.

148. A "serious" nonattainment designation for the Denver Front Range Area will mandate that EPA impose stricter permitting requirements, emission control requirements, and monitoring requirements on the Denver Front Range Area, resulting in harm to Defend Colorado's members operating in the Denver Front Range Area. 42 U.S.C. § 7511a(c).

149. Colorado's May 1, 2019 certification to EPA will therefore "amend[], or modify[] . . . ambient air quality standard[s] . . . emission control regulation[s] [and] . . . regulatory plans or programs" under Colorado's Air Act pursuant to C.R.S. § 25-7-110.

150. Colorado's May 1, 2019 certification to EPA will also "require[e] compliance in this state with any ambient air quality standard or emission control regulation" pursuant to C.R.S. § 25-7-124(3).

151. The Commission is therefore required by the Colorado Air Act to hold a hearing on the contents and basis of Colorado's May 1 certification to EPA.

152. The Commission's denial of Defend Colorado's Petition, which requested an expedited public hearing to examine international emissions and exceptional events, and to consider including a demonstration of international emissions and exceptional events, is a denial of the hearing mandated by the Colorado Air Act before Colorado's May 1 certification.

153. Further, even absent Defend Colorado's Petition, the Commission is required by the Colorado Air Act to hold a hearing on Colorado's May 1 certification to EPA in the absence of any petition, as the May 1 certification affects Colorado's obligations under the Clean Air Act and will modify air quality control programs in Colorado as required by the Clean Air Act.

154. The Commission has therefore violated of its mandatory statutory duty to hold a hearing under the Colorado Air Act in advance of Colorado's May 1, 2019 certification to EPA, and any subsequent 2019 certification made to EPA is therefore invalid and must be set aside.

SECOND CLAIM FOR RELIEF

(Colorado Air Act and Clean Air Act – Commission Only) (Failure to Develop the Most Accurate Air Emissions Inventory Possible to Guide Air Control Programs in Colorado and to Ensure Such Programs Bear a Reasonable Relationship to the Economic, Environmental, and Energy Impacts of Such Measures)

155. Defend Colorado hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

156. The Commission “shall promulgate such rules and regulations *as are consistent with the legislative declaration set forth in section 25-7-102* and necessary for the proper implementation and administration” of the Colorado Air Act. C.R.S. § 25-7-105(1) (emphasis added).

157. The Commission “shall have maximum flexibility in developing an effective air quality control program and may promulgate such combination of regulations as may be necessary or desirable to carry out that program; except that such program and regulations *shall be consistent with the legislative declaration set forth in section 25-7-102*. C.R.S. § 25-7-106(1) (emphasis added).

158. The legislative declaration of the Colorado Air Act requires the “development of an air quality control program in which the benefits of the air pollution control measures utilized bear a reasonable relationship to the economic, environmental, and energy impacts and other costs of such measures; and to maintain a cooperative program between the state and local units of government” that is based on “*the most accurate inventory of air pollution sources possible*.” C.R.S. § 25-7-102 (emphasis added).

159. Separately, EPA’s regulations under the Clean Air Act require that Colorado’s May 1 certification to EPA is “accurate to the best of [Colorado’s] knowledge.” 40 CFR § 58.15(a).

160. The Commission, as demonstrated in this Complaint, is well aware that international emissions and exceptional events make up a significant portion of the inventory of air pollution sources affecting air quality in Colorado.

161. Not only is the Commission well aware of the impact of international emissions and exceptional events on Colorado’s air inventory, but up until Governor Polis gave the Commission unlawful and interfering direction to the contrary, the Commission was actively considering directing CDPHE, the Division, and the RAQC to develop a Clean Air Act Section 179B international emissions and Section 319(b) exceptional events demonstration to EPA along with Colorado’s May 1, 2019 certification.

162. The Commission has the ability in its May 1 certification to EPA to “flag” exceptional events and international emissions relevant to Colorado’s prior year’s emissions data. See EPA, Air Quality System Users Guide, Issue 2 (2018) (available at

https://www.epa.gov/sites/production/files/2018-03/documents/aqs_user_guide_2018_2.pdf#%5B%7B%22num%22%3A270%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C69%2C720%2C0%5D

163. Therefore, any May 1 certification to EPA that does not include a complete, accurate, and scientifically based accounting of international emissions or exceptional events violates the mandate of the Colorado Air Act that Colorado's Air Quality Control program is based on the "most accurate inventory of air pollution sources possible," and violates the Clean Air Act's mandate that Colorado's May 1 certification to EPA is "accurate to the best of [Colorado's] knowledge."

164. The Division specifically recognized in its response to Defend Colorado's Petition that Governor Polis has directed the Division not to investigate or pursue any demonstration relating to the contribution of international emissions or exceptional events to Colorado's air quality.

165. Commissioner Elise Jones specifically recognized, as quoted by the Denver Post after the March 21, 2019 Commission meeting, that the Commission should not pursue procedural pathways to "get off the hook." Compl., *supra*, at ¶ C.122

166. The Commission's March 21, 2019 Commission Order, the Division's response to Defend Colorado's Petition, and Commissioner Elise Jones' comments to the Denver Post all establish that the Commission has abandoned its statutory duty to provide an accurate May 1, 2019 certification to EPA as required by the Colorado Air Act and the Clean Air Act.

167. The Commission's denial of Defend Colorado's Petition and refusal to hold a public hearing on Colorado's pending May 1 certification to EPA is therefore a violation of the Colorado Air and the Clean Air Act, and any subsequent 2019 certification made to EPA is therefore invalid and must be set aside.

THIRD CLAIM FOR RELIEF

**(Colorado Constitution and Colorado Air Act – Governor Polis and Commission)
(Violation of the Separation of Power by Improperly Influencing the Commission's
Duties Under the Colorado Air Act)**

168. Defend Colorado hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

169. The Colorado Constitution mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." COLO. CONST. art. III.

170. The Colorado legislative branch, through the General Assembly, codified the Colorado Air Act, and created the Commission in the CDPHE. C.R.S. § 25-7-104(1).

171. The Colorado legislative branch, through the General Assembly, has designated that the Commission “shall serve as the state agency for all purposes of the federal [CLEAN AIR ACT] and regulations promulgated under said act.” C.R.S. § 25-7-124(1).

172. The Colorado legislative branch, through the General Assembly, has set forth that the duties of the Commission include promulgating “rules and regulations” (C.R.S. § 25-7-105(1)) and “developing an effective air quality control program and may promulgate such combination of regulations as may be necessary or desirable to carry out that program; except that such program and regulations shall be consistent with the legislative declaration set forth in section 25-7-102.” C.R.S. § 25-7-106(1).

173. The Colorado legislative branch has clearly and unequivocally decided that the Commission, not the Governor, shall develop Colorado’s air quality control rules, regulations, and programs under the Colorado Air Act and shall administer Colorado’s obligations under the Clean Air Act.

174. Governor Polis, since taking office, has improperly and unilaterally attempted to influence the Commission’s statutory duties to administer the Colorado Air Act and Colorado’s obligations under the Colorado Air Act, including directing the Commission and the Division to ignore the statutory provisions of C.R.S. §§ 25-7-102; 105; 106; 110; and 124 which collectively require the Commission to hold a public hearing to develop a complete and accurate inventory of emissions sources that contribute to ambient air quality in Colorado, including emissions from international sources and exceptional events, in advance of Colorado’s May 1, 2019 certification to EPA.

175. Governor Polis’ improper attempts to influence Colorado’s air quality violated the separation of powers required by Article III of the Colorado Constitution.

176. The Commission’s acquiescence to Governor Polis’ improper influence over what should have been an impartial decision on Defend Colorado’s Petition, and Colorado’s direction under the Colorado Air Act and the Clean Air Act was also a violation of the separation of powers required by Article III of the Colorado Constitution and the Commission’s duties under the Colorado Air Act.

FOURTH CLAIM FOR RELIEF

**(Colorado Constitution and Colorado Air Act – Governor Polis Only)
(Violation of the Separation of Power by Engaging in Actions Reserved to the
Commission by the General Assembly in the Colorado Air Act)**

177. Defend Colorado hereby incorporates by reference, as if fully set forth herein, all of the allegations contained in the paragraphs above.

178. The Colorado legislative branch, through the General Assembly, has designated that the Commission “shall serve as the state agency for all purposes of the federal [Clean Air Act] and regulations promulgated under said act.” C.R.S. § 25-7-124(1).

179. The Colorado legislative branch, through the General Assembly, requires that the Commission hold a public hearing before ratifying any agreement between Colorado and the federal government under the Clean Air Act “involving, authorizing, or requiring compliance in this state with any ambient air quality standard or emission control regulation.” C.R.S. §25-7-124(3).

180. Governor Polis’ March 26, 2019 Withdrawal Letter to EPA, withdrawing Colorado’s prior attainment date extension request was a usurpation of the Commission’s statutory duty and authority under the Colorado Air Act.

181. Governor Polis’ Withdrawal Letter also violates the Colorado Air Act’s statutory requirement that the Commission hold a public hearing before entering into an agreement with EPA “involving, authorizing, or requiring compliance” with air quality control regulations. C.R.S. §25-7-124(3).

182. Governor Polis’ Withdrawal Letter is a violation of the separation of powers required by Article III of the Colorado Constitution and the Colorado Air Act, and is invalid.

PRAYER FOR RELIEF

WHEREFORE, and for all of the reasons set forth herein, Plaintiff Defend Colorado request this Court to:

- A. Declare that the Commission violated its statutory duties under the Colorado Air Act and mandate that the Commission hold a hearing in advance of Colorado’s May 1 annual certifications to EPA;
- B. Require that the Commission hold a public hearing to develop a complete and accurate accounting of emission sources that contribute to ambient air quality in Colorado, including sources of international emissions and exceptional events and their effects on ozone concentrations in Colorado;
- C. Declare that the Governor and the Commission violated the Separation of Powers required by the Colorado Constitution;
- D. Hold unlawful and set aside the Commission’s improperly influenced Order denying Defend Colorado’s Petition;
- E. Hold unlawful, set aside, and enjoin Governor Polis’ March 26, 2019 withdrawal letter to EPA;

- F. Declare that any subsequent 2019 certification made by the Commission to EPA is invalid and must be set aside;
- G. Require that the Commission correct any subsequent invalid 2019 certification based on the results of the public hearing to develop a complete and accurate accounting of emission sources that contribute to ambient air quality in Colorado, including sources of international emissions and exceptional events and their effects on ozone concentrations in Colorado;
- H. Grant any other such relief as this Court deems just and proper.

Respectfully submitted this 23rd day of April, 2019.

GREENBERG TRAURIG, LLP

s/Paul M. Seby

Paul M. Seby (#27487)

Matt Tieslau (#47483)

GREENBERG TRAURIG, LLP

1200 Seventeenth Street, Suite 2400

Denver, Colorado 80202

Phone Number: 303.572.6500

Fax Number: 303.572.6540

E-Mail: SebyP@gtlaw.com

TieslauM@gtlaw.com

ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

Defend Colorado
Jonathan Anderson
Executive Director, Defend Colorado
1800 Glenarm Place, Suite 950,
Denver, CO 80202